

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

NO. 77-6175

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORMAN BIRNBAUM, ET AL.,

Plaintiffs-Appellees,

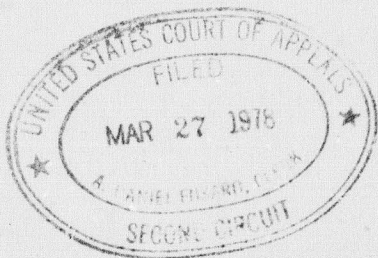
v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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I N D E X

	<u>Page</u>
Preliminary Statement -----	1
Questions Presented -----	1
Statement -----	2
1. Nature of the Case. -----	2
2. The CIA Mail Opening Project. -----	2
3. The Letter from Prof. Birnbaum. -----	8
4. The Letter to Mr. Avery. -----	9
5. The Letter from Plaintiff MacMillen. -----	10
6. District Court Proceedings. -----	11
Summary of Argument -----	13
Argument -----	16
I. The Discretionary Function Exception To The Federal Tort Claims Act Applies In This Case. -----	16
II. The Postal Matter Exception To The Tort Claims Act Applies In This Case. -----	28
III. There Is No Cause Of Action Under New York State Law For Which The District Court Could Award Damages In This Case. -----	32
IV. The District Court Awarded Excessive Damages In This Case. -----	39
Conclusion -----	49
Certificate of Service -----	49

CITATIONS

Cases:

Assn. for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee, 37 Misc. 2d 599, 236 N.Y.S.2d 216 (Sup. Ct. 1962) -----	33
Baisch v. State, 76 Misc. 2d 1006, 351 N.Y.S.2d 617 (Ct. Cl. 1974) -----	38
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) -----	38

Cases continued:

Blair v. Union Free School District No. 6, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971) -----	33
Casler v. State, 33 A.D.2d 305, 207 N.Y.S.2d 695 (4th Dept. 1970) -----	38
Century Arms, Inc. v. Kennedy, 323 F. Supp. 1002 (D. Vt.) aff'd 449 F.2d 1306 (C.A. 2, 1971), cert. denied, 405 U.S. 1065 (1972) -----	25
Dalehite v. United States, 346 U.S. 15 (1953) ----	13, 17-20
Dellums v. Powell, 566 F.2d 167 (C.A.D.C., 1977) -----	46
Estate of Hemingway v. Random House, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E. 2d 250 (1968) --	35
Fort v. White, 530 F.2d 1113 (C.A. 2, 1976) -----	44-45
Frady v. State, 19 A.D.2d 783, 242 N.Y.S.2d 95 (3d Dept. 1963) -----	37-38
Frankel v. Heym, 466 F. 2d 1226 (C.A. 3, 1972) ---	47
Galella v. Onassis, 487 F. 2d 986 (C.A. 2, 1973) -	34
Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952) -----	33
Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818) ----	36
Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) -----	34
Hatanley v. United States, 351 U.S. 173 (1956) ---	13, 21-23, 24, 25
Herman v. State, 78 Misc. 2d 1025, 357 N.Y.S.2d 811 (Ct. Cl. 1974) -----	38
In re Ryan's Estate, 115 Misc. 472, 188 N.Y.S. 387 (Sup. Ct. 1921) -----	36, 37
Kiiskila v. United States, 466 F.2d 626 (C.A. 7, 1972) -----	27-28
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) -----	25

Cases continued:

Long v. Beneficial Finance Co. of N.Y., 39 A.D.2d 11, 330 N.Y.S. 2d 664 (1972) -----	34
Magnett v. Pelletier, 488 F.2d 33 (C.A. 1, 1973) -----	45
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) -----	25
Marine Ins. Co. v. United States, 378 F.2d 812 (C.A. 2, 1967), cert. denied, 389 U.S. 953 -----	14, 28, 29
Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) -----	47
Meeropol v. Nizer, 381 F.Supp. 29 (S.D.N.Y. 1974) -----	35
Myers & Myers, Inc. v. United States Postal Service, 527 F. 2d 1252 (C.A. 2, 1975) -----	12, 24-26
Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), affd. 31 A.D.2d 392, 298 N.Y.S.2d 137 (1969), affd. 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E..2d 765 (1970) -----	33, 34, 38
O'Connor v. United States, 269 F.2d 578 (C.A. 2, 1959) -----	47
People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976) -----	38
People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) -----	37
Piphus v. Carey, 545 F.2d 30 (C.A. 7, 1976), cert. granted, 45 U.S.L.W. 3960 (April 18, 1977) -----	44
Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442 (1902) -----	32, 34, 36
Rome Sentinel Co. v. Boustedt, 43 Misc. 2d 598, 252 N.Y.S. 2d 10 (Sup. Ct. 1964) -----	33
Smith v. Losee, 485 F. 2d 334 (C.A. 10, 1973) (en banc), cert. denied, 417 U.S. 908 (1974) ---	45

Cases continued:

Stolberg v. Members of Bd. of Trustees, 474 F. 2d 485 (C.A. 2, 1973) -----	45
Twentier v. United States, 109 F. Supp. 406 (Ct. Cl. 1953) -----	31
Unified School District No. 480 v. Epperson, 551 F.2d 254 (C.A. 10, 1977) -----	45
United States ex. rel Larkins v. Oswald, 510 F.2d 583 (C.A. 2, 1975) -----	42
United States ex rel. Tyrrell v. Speaker, 535 F.2d 823 (C.A. 3, 1976) -----	45

Statutes, Rules and Regulations:

18 U.S.C. § 2520 -----	12, 43, 48
28 U.S.C. § 1346(b) -----	2, 32
28 U.S.C. §§ 2671-2680 -----	2
28 U.S.C. § 2674 -----	15, 47
28 U.S.C. § 2680(a) -----	16-19, 22, 24
28 U.S.C. § 2680(b) -----	28
42 U.S.C. § 1982 -----	45
42 U.S.C. § 1983 -----	44
42 U.S.C. § 3601 <u>et seq.</u> -----	45
50 U.S.C. § 403(d) -----	20
Rule 30(c), F.R.A.P. -----	2
Second Circuit Rule 30(1) -----	2
39 C.F.R. Part 10 -----	31

Statutes, Rules and Regulations continued:

39 C.F.R. Part 111 -----	30
Postal Service Manual 162.11 -----	30
Postal Service Publication 42, International Mail -----	31

Miscellaneous:

22 Am. Jur.2d, <u>Damages</u> § 13 -----	44
Commission on CIA Activities Within the United States, The CIA's Mail Intercepts, in Report to the President 101-15 (1975) (Rockefeller Commission Report) -----	2-3, 4
Executive Order 11905 -----	6, 42
H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 ----	17-26
36 N.Y. Jur., <u>Literary Property and Copyright</u> § 56 -----	36
Oxford English Dictionary, Vol. M at 498 (1933) Compact Edition at 1809 (1971) -----	30
Prosser, <u>Torts</u> § 2 (4th ed. 1971) -----	47
Prosser, <u>Torts</u> § 117 (4th ed., 1971) -----	32, 33
Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Domestic CIA and FBI Mail Opening Programs, in III Final Report: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, 94th Cong., 2d Sess. 559-677 (1976) -----	3, 4, 7-8
Webster's Third New International Dictionary at 1442 (1966) -----	29

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BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the August 17, 1977, judgment of Judge Jack B. Weinstein. The opinion is reported at 436 F. Supp. 967 (E.D.N.Y., 1977).

QUESTIONS PRESENTED

1. Whether the discretionary function exception to the Federal Tort Claims Act applies in this case.
2. Whether the postal matter exception to the Federal Tort Claims Act applies in this case.

3. Whether there is a cause of action under New York state law for which the district court could award damages in this case.

4. Whether the district court award of damages in this case was excessive.

STATEMENT

1. Nature of the Case.

The district court in this case consolidated three suits brought under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680. The plaintiffs sought damages for the opening of their mail by the CIA. Following a trial, for which the district court empaneled an advisory jury, the district court awarded each of the three plaintiffs \$1,000 in damages. The United States now appeals.

2. The CIA Mail Opening Project.

From 1953 through 1973 the Central Intelligence Agency operated a project which was designed to examine, for national security, intelligence, and counter-intelligence purposes, certain mail to or from the Soviet Union which passed through the United States Post Office in New York. The operation of the project is described in the Attorney General's Report on Mail Opening, ^{1/} Chapter 9 of the Rockefeller

^{1/} App. 179. The parties have agreed to follow the deferred appendix procedure in this case. Rule 30(c), F.R.A.P.; Second Circuit Rule 30(1).

Commission Report, ^{2/} and the Church Committee Report (hereinafter "Senate Report"). ^{3/}

Some of the mail was opened, photographed, and returned to the mail within 24 hours. Although it is unclear at precisely what level the program was authorized, ^{4/} the program

^{2/} Commission on CIA Activities Within the United States, The CIA's Mail Intercepts, in Report to the President 101-15 (1975).

^{3/} Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Domestic CIA and FBI Mail Opening Programs, in III Final Report: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, 94th Cong., 2d Sess. 559-677 (1976).

^{4/} The Senate Report summarized the evidence as to the level at which the mail opening project was authorized:

Placed in the light most favorable to the Agency, the CIA obtained the prior oral approval of a Postmaster General for the photographing of envelope exteriors in 1954, and the implied, post facto permission of two Postmasters General, one Attorney General, and one President for both the mail opening and the mail cover aspects of the operation. But the Cabinet officers who were allegedly informed of the mail openings deny such knowledge -- in one case because the official acknowledged that he did not want to know and did not believe that he could or should control Agency projects that affected his own Department. In the case of the President, no documentary record of the briefing exists and the CIA official who allegedly informed him concedes that there is only a "possibility" that he "mentioned" it.

(continued on page 4)

was unquestionably authorized at policy-making levels of the CIA. In November, 1955, for instance, the CIA's Chief of Counterintelligence asked Richard Helms, then Deputy Director for Plans, for formal approval of a new counterintelligence program in conjunction with the mail project. Rockefeller Report at 104-105; Senate Report at 580. The request stated that "more letters will be opened." "They are presently able to open only a very limited number." Rockefeller Report at 104. The request was approved in writing. Id. at 105; Senate Report at 580.

According to the CIA's analysis, selection of approximately 60% of the letters was based on some form of watchlist, either by name, location, institution, or similar consideration. Project personnel using their own project experience

4/ (continued from page 3)

Senate Report at 584-85 (footnote omitted). The Attorney General's Report states:

Whether the failure of the Department's investigation to uncover any direct evidence, written or oral, of presidential knowledge or authorization was caused by the nonexistence of such knowledge or authorization, by confusion of mail openings with "mail covers," which were generally viewed as legitimate, or by the passage of time and the "presidential deniability" concept discussed above, cannot be determined. However, on the existing record, the government could not prove in a criminal prosecution beyond a reasonable doubt that the East Coast Project was conducted without presidential approval or without presidential knowledge and acquiescence.

Attorney General's Report at 19; App. 197.

and judgment selected additional letters for opening. The letters selected for opening were put aside and the remaining mail was put back in the mail bags and returned to the mail room for postal processing that same day. Opened letters were duplicated and then returned for further postal processing within 24 hours. Each copy was sent from New York to the CIA headquarters in Langley, Virginia. The copies were then sent to the counterintelligence staff of the CIA where they were analyzed by a supervisor and four trained letter analysts. Their purpose was to summarize in English the contents of the letters. This counterintelligence staff prepared various reports on their analyses and, depending upon the contents of particular letters and the various interests and requirements of the CIA and of other intelligence agencies, sent certain reports to the different "customers," primarily the FBI, and the Security Research Staff, the Office of Security of the CIA, and some other operating components within the CIA. Special and specific clearance had to be granted individually for anyone to have knowledge of and access to the project and the products.

Generally between 50 and 75 items were opened and copied each day. Over the life of the project approximately 215,000 pieces of mail were copied. The program was terminated in February, 1973.

In 1975 and 1976 the Department of Justice conducted an investigation to determine whether anyone responsible for the

CIA mail opening program committed presecutable criminal offenses. The Department had access to the documentary evidence in the possession of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. In its report the Department concluded that conduct similar to the mail opening project today would be clearly illegal. Report at 49-52; App. 227-30. This conclusion was based on the lack of authority evidenced by Executive Order 11905 (which withdrew any prior authorization for CIA mail opening programs) and on the basis of relatively recent Fourth Amendment court cases. Id. The Department decided, however, not to prosecute any individuals for their part in the mail opening program because of the unavailability of important evidence (see Report at 43-49; App. 221-27), and because of "the state of the law that prevailed during the course of the mail openings program." Report at 3; App. 181. The Report contains a lengthy discussion (at 27-39; App. 205-17) of the "substantial evolution" of Fourth Amendment law, and states:

During the 1950s, and well into the 1970s, the law concerning clandestine surveillance was quite different, and the requirement of prior judicial authorization was different. Indeed, until 1967 respected scholars argued that the judiciary was the wrong branch of government to make authorization decisions concerning any clandestine surveillance; until 1972 courts held that prior judicial scrutiny was unnecessary when the surveillance

involved national security; and at the present time the case law indicates that prior judicial scrutiny is not necessary when surveillance of foreign powers or their agents is involved.

Report at 27-28; App. 205-206. In its conclusion the Report stated that "whatever can be said about the law now, the Department believes at the time the potential defendants acted, there was a substantial basis for thinking that the law was otherwise." Report at 53-54; App. 231-32. 5/

5/ See also the statement of J. Edward Day, President Kennedy's Postmaster General:

If the CIA lawyers concluded that the CIA could not open mail to and from Communist countries in the early 1960's without violating the law, I think the CIA needs better lawyers.

One can't answer such a unique legal question merely by reading from various postal statutes and citing court decisions relating to warrantless mail openings from the 19th century, which did not involve spying, cold war or subversive activities. A less simplistic approach to the problem is required.

For example, statutes clearly say it is a crime to kill or attempt to kill someone with premeditation. These statutes, and others making felonies of arson, kidnapping, etc., do not say "except in time of war." But we all know that exception is read into these laws (even if the killing or arson was in a "war" of doubtful legality ordered by Lyndon Johnson and Richard Nixon).

(continued on page 8)

3. The Letter from Prof. Birnbaum.

Plaintiff Norman Birnbaum is a professor of sociology at Amherst College in Massachusetts. In 1970 he wrote letters to two academic colleagues -- one in Canada and one in Rumania -- about an upcoming meeting of specialists in the sociology of religion. He sent copies of those two letters to a third colleague at Moscow State University. The CIA copied the contents of the third letter while it was in transit through the foreign mail depot at Kennedy International Airport, and later distributed four copies to various units of the CIA. The particular letter was opened because intelligence agencies had an interest in correspondence to and from Moscow State University.

As a result of a Freedom of Information Act request, Prof. Birnbaum found out in June, 1975, that his 1970 letter had been opened. Tr. 9-13; App. 35-39. He alleged "moral and psychological injury" as a result of his "outrage, shock, disappointment" at the fact that a federal agency could be engaged in such activity, Tr. 14-17; App. 40-43. He disclaimed any financial or physical injury, and stated that the

5/ (continued from page 7)

In my opinion, the statutes relating to opening of mail must similarly have read into them an exception for opening mail to and from Communist countries by the CIA in time of cold war.

Senate Report at 606 n. 208; App. 250.

material in the letter was not publishable. Tr. 17; App. 43. He did not lose sleep over the fact that his letter had been opened (Tr. 27; App. 53), and did not change his letter-writing activity as a result of the knowledge (Tr. 28-29; App. 54-55). The contents of the letter were open to other academics in the International Sociological Association. Tr. 25; App. 51.

4. The Letter to Mr. Avery.

Plaintiff B. Leonard Avery was written several letters by his son, while the son was an exchange student at Moscow State University in 1963. One of these letters was opened, apparently because it was from a Soviet university. Tr. 106; App. 119. Three copies of the letter were made, and one of these was sent to the FBI, where, however, it was not disseminated beyond initial processing (Tr. 117-20; App. 131-33).

As a result of his son's Freedom of Information Act request, Mr. Avery found out in July, 1975, that his son's 1968 letter to him was opened. Tr. 35-36; App. 61-62. Mr. Avery testified that he was appalled that such actions could occur in a democratic country, that it was inexcusable, it shattered his faith in the Government, and that he experienced disappointment. Tr. 38, 45-46; App. 64, 71-72. Mr. Avery disclaimed financial or physical harm, and stated that he had no intent to publish the letter. Tr. 35, 38, 44; App. 61, 64, 70. He stated that he experienced apprehension that other rights might be infringed, but admitted that he continued to discuss sensitive matters on the telephone since he had learned of the mail opening. Tr. 44-45; App. 70-71.

5. The Letter from Plaintiff MacMillen.

Plaintiff Mary Rule MacMillen wrote a personal letter in 1973 to a well-known Soviet citizen she had met on a trip to Russia. Her letter was intercepted at Kennedy Airport, and opened. The person to whom the letter was addressed was known to have made statements contrary to the position of Soviet Government, and was on a watchlist of mail to be opened. Tr. 75-77; App. 102-104. Only one copy of plaintiff MacMillen's letter was made; it was summarized and filed without further dissemination. Tr. 102-103; App. 115-16.

Plaintiff MacMillen discovered that her letter had been opened by means of a response dated January 7, 1976, to her Freedom of Information Act request. Tr. 57-58; App. 83-84. She testified that she was "shocked" (Tr. 57; App. 83), that her trust had been shattered, and that she experienced "absolute outrage" (Tr. 61; App. 87), and disappointment and disillusionment (Tr. 64; App. 91). She also stated that because of the personal nature of the letter she experienced embarrassment and humiliation. Tr. 62; App. 88. She stated that a skin and respiratory ailment flared up shortly after she learned that her mail had been opened, but she did not seek damages for this alleged harm. Tr. 68-69; App. 95-96. She stated there was no further physical injury and no financial injury. Tr. 69, 78; App. 96, 105. She stated she had had a fear that the letter might affect her future ability to work for the government and a "more important," but "nebulous," fear that her

correspondent would be adversely affected (Tr. 65-66; App. 92, 93), but she had twice written the same correspondent since learning of the mail opening (Tr. 79; App. 106).

Plaintiff MacMillen also testified that she in fact suspected that the Soviet authorities would open her letter. Tr. 66; App. 93 . But in this regard she stated:

It is a question of degree of embarrassment. And a foreigner wouldn't understand the nuances of the language where an English speaker would.

Tr. 67; App. 94 . She conceded, however, that her correspondent himself was a Soviet citizen who speaks English "to a certain extent." Tr. 81; App. 108.

6. District Court Proceedings.

All three plaintiffs brought suit under the Federal Tort Claims Act seeking damages for the opening of their respective letters. Plaintiff Avery brought suit in the District of Minnesota; his suit was transferred to the Eastern District of New York. The district court rejected plaintiff MacMillen's motion to certify her suit as a class action on the grounds that (1) the injured persons who would make up a class are not easily identified, (2) little practical advantage would accrue from class certification since, on the issue of liability, class members would share only legal issues, and (3) a class action would present inordinate management problems because the facts on damages in each case would have to be determined separately.

436 F. Supp. at 985-86; App. 157-53. The court however consolidated the three cases for trial and empaneled an advisory jury. Following trial, the jurors recommended equal verdicts for the plaintiffs ranging from \$2,500 to \$10,000.

The district court held that it had jurisdiction under the Federal Tort Claims Act, and that neither the discretionary function exception, the postal matter exception, nor the intentional tort exception to that Act applies. 436 F. Supp. at 972-76; App. 144-48. The court found that New York law would provide plaintiffs with one of three causes of action: (1) common law right to privacy, (2) common law copyright, and (3) tort for violation of constitutional rights. 436 F. Supp. at 976-85; App. 148-57. In awarding damages, the court credited the testimony of plaintiffs that they "suffered actual mental pain, outrage and shock," and added that the "parties are entitled to recover for the invasion of their rights, without respect to the consequences." 436 F. Supp. at 987; App. 159. The court found the advisory jury recommendations instructive but "somewhat high," and found guidance in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520, which set \$100/day or \$1,000, whichever is larger, as a basic damage figure for individuals whose telephone or oral conversations are intercepted without legal sanction. 436 F. Supp. at 988-89; App. 160-61. The court accordingly awarded \$1,000 to each plaintiff, "provided the government furnishes a suitable letter of

regret and assurance of non-recurrence." 436 F. Supp. at 989; App. 161. In its conclusion the court stated that

knowledge by government officials that individuals have effective legal remedies to enforce their rights may deter future illegality.

436 F. Supp. at 989-90; App. 161-62.

SUMMARY OF ARGUMENT

In Point I we demonstrate that by means of the discretionary function exception to the Federal Tort Claims Act Congress intended to preclude suits, such as the instant one, which challenge the constitutionality or legality of a government program authorized at policy-making levels of a federal agency. Dalehite v. United States, 346 U.S. 15 (1953). Only an extraordinarily strained reading of the Act and its legislative history permits the conclusion that the constitutionality and legality of discretionary administrative acts may be tested under the Act. Neither Hatahley v. United States, 351 U.S. 173 (1956) nor Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (C.A. 2, 1975) requires the conclusion that whenever illegal action is alleged, the discretionary function exception is inapplicable. In those cases operational level actions were taken in contravention of decisions made at the policy-making level and embodied in regulations. Such cases contrast with the instant one, where

operational level actions were taken as a direct result of decisions made at policy-making levels.

In Point II we show that the postal matter exception to the Federal Tort Claims Act also precludes plaintiffs' claims, since they arise out of the miscarriage of letters. The exception applies even though actions by non-postal personnel for non-postal purposes are involved. Marine Ins. Co. v. United States, 378 F.2d 812 (C.A. 2, 1967), cert. denied 389 U.S. 913. The exception is not limited to claims where the risk could have been avoided by registration and insurance.

In Point III we demonstrate that even if none of the Federal Tort Claims Act exceptions apply, the district court erred in holding that plaintiffs could recover on the basis of one of three causes of action under New York law. (1) New York recognizes only statutory causes of action for invasion of privacy, and none applies in this case. (2) New York common law copyright law could not support the district court's award of damages, since the only injury asserted by plaintiffs, and found by the district court, is not the kind for which common law copyright provides protection. (3) There is no support for the district court's conclusion that New York would recognize a cause of action for constitutional violations, where no other recognized tort is present.

Finally in Point IV we show that even if the district court was correct in awarding damages in this case, the award was excessive. The actual intangible injury to plaintiffs

cannot support an award of \$1,000 to each plaintiff. The district court relied also on the inherent value of constitutional rights in awarding damages. This theory is inconsistent with the common law of torts as well as with the Federal Tort Claims Act. The district court's reliance on the Omnibus Crime Control and Safe Streets Act and its apparent reliance upon deterrence are also misplaced. Deterrent interests are punitive in nature and may not support damage awards under the Federal Tort Claims Act. 28 U.S.C. §2674.

ARGUMENT

I.

THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT APPLIES IN THIS CASE.

The present suit constitutes in essence a challenge to the legality of a government program. The plaintiffs do not challenge the particular letter openings in this case as inconsistent with the intended scope of the program or as negligent. Rather it is the very nature of the program--opening private mail--that plaintiffs challenge and seek compensation for. There is nothing in the Federal Tort Claims Act or its legislative history to indicate that Congress intended to permit a challenge to the legality of such a program under the Tort Claims Act. In fact the discretionary function exception to that Act was designed to prevent just such suits. The exception states that the Act will not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(a). While the first part of this exception may not by its terms apply in this case because no statute or regulation specifically authorized the mail opening program, it does demonstrate that the very institution and maintenance of a government program will not generally result in liability under the Tort Claims Act. This is because ordinarily such

programs are instituted by statute or regulation. Even where a statute or regulation establishing a program is clearly unconstitutional, the program cannot be challenged under the Act. Thus the legislative history of this provision explicitly states:

Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.

H. R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6.^{6/} Thus if the mail opening program had been set up by regulations promulgated by the CIA, even though the regulations were illegal and unconstitutional, this suit would clearly fail. It is unlikely that Congress contemplated that suit would be permitted under the Tort Claims Act in a case such as this merely because by the very nature of the CIA and of the particular program involved, establishment of the program by regulation was impossible.

Congress in fact precluded liability under the Tort Claims Act in this case under the second part of §2680(a), the discretionary function exception. This conclusion is required by Dalehite v. United States, 346 U.S. 15 (1953). Dalehite was a suit for wrongful death, where numerous deaths resulted

^{6/} The paragraph which contains this quote appeared repeatedly after 1942 prior to inclusion in the House Report of the Congress that adopted the Tort Claims Act. See Dalehite v. United States, 346 U.S. 15, 29-30, n. 21.

from a disastrous explosion of fertilizer produced at the instance, according to the specifications of, and under the control of the United States. The district court had found that the explosion resulted from negligence on the part of the Government in adopting the fertilizer export program as a whole. The suits for damages were not based on individual acts of negligence but rather were predicated on negligence in the adoption of the fertilizer export plan as a whole, negligence in various phases of the manufacturing process, and official dereliction of duty in failing to police ship-board loading of the fertilizer. 346 U.S. at 23-24. The Supreme Court held that the discretionary function exception was applicable to the claims.

The Court carefully analyzed the legislative history and purposes of §2680(a) (346 U.S. at 24-30), and concluded that

The "discretion" protected by the section is not that of the judge--a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.

346 U.S. at 34. To the plaintiffs' argument in that case that in the manufacturing of the fertilizer "the Government was not charged with any discretionary function or opportunity of discretion," the Supreme Court responded:

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under

the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

346 U.S. at 35-36. In the instant case it can hardly be doubted that there was room for policy judgment in the decision to implement a program of opening international mail. Appropriately taken into account, for instance, would have been policy considerations such as the relative desirability of having government officials open private mail, in light of the need for intelligence about the Soviet Union. And just as clearly, the decision to implement the program was made at policy-making levels of the CIA, if not higher. See pp. 3 - 4 , supra. Accordingly, as in Dalehite, the discretionary function exception applies.

The assertion that the decisions to establish the mail opening program were contrary to the law or contrary to the constitution cannot serve to distinguish Dalehite. As we have shown, Congress did not intend to permit constitutional or statutory challenges to programs set up by regulation. It would not make sense to limit the discretionary function exception for the very reason that a constitutional or statutory challenge to a program was involved. In its discussion of the legislative history of §2680(a), the Supreme Court stated:

The exception was drafted as a clarifying amendment to the House bill to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions. An Assistant Attorney General, appearing

before the Committee especially for that purpose, explained it as avoiding "any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity," merely because "the same conduct by a private individual would be tortious." It was not "intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort." The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project and the like."

346 U.S. at 26-27 (footnotes omitted, emphasis added). ^{7/}

It would simply be parsing the words of this legislative history too closely to say that in the context of "the execution of a Federal project" (1) the constitutionality of legislation may not be tested, (2) the legality of regulations may not be tested, and (3) the propriety of discretionary administrative acts may not be tested, but (4) the constitutionality and legality of discretionary administrative acts may be tested. Yet such a test is precisely what is required if the applicability of the discretionary function exception is to depend, as the district court reasoned, upon the constitutionality and legality of the discretionary administrative act. ^{8/}

^{7/} The reference to "legally authorized activity" must refer to activity within the realm of a federal official's legal responsibilities, since action pursuant to an unconstitutional statute or an illegal regulation is not "legally authorized" in a strict sense, yet liability is still precluded by the exception. Mail openings obviously constitute a means for gathering foreign intelligence, and therefore constitute a means by which the CIA can carry out its statutory function. See 50 U.S.C. §403(d).

^{8/} The Government will not argue that the actions of the CIA in this case were legal or constitutional, should this Court find it necessary to reach the issue. The Attorney General's

(fn. continued on next page)

The district court did in fact rely upon its holding that the CIA mail opening program was illegal and unconstitutional to dispose of the discretionary function exception. 436 F. Supp. at 973-74; App. 145-46. In doing so the court relied upon Hatahley v. United States, 351 U.S. 173 (1956) and Myers & Myers, Inc. v. United States Postal Service, 527 F. 2d 1252 (C.A. 2, 1975). But Hatahley, when carefully read, does not require the conclusion that the discretionary function exception is inapplicable whenever illegal action is alleged, and this Court's aphoristic statement in Myers that "a federal official cannot have discretion to behave unconstitutionally," 527 F. 2d at 1261, must be read in the context of the Myers case.

In Hatahley, certain Navajo Indians living in southeastern Utah sued under the Tort Claims Act to recover for the confiscation and destruction by federal agents of their horses, which were grazing on public lands of the United States. The Government defended on the ground that the federal agents were acting pursuant to the Utah abandoned horse statute. The record indicated that the statute was applied discriminatorily against the Indians, whose horses were essential to their existence. 351 U.S. at 175-77. The Supreme Court first held that the Utah abandoned horse statute could not be invoked by the local federal range manager to avoid the requirements of a federal

8/ (Continued):

Report demonstrates, however, that the issue is not free from doubt. See pp. 5 - 7, supra. We do contend strongly, however, that the issue is not the kind that Congress intended to be decided in the context of a Federal Tort Claims Act suit.

regulation governing the removal of livestock trespassing on federal land. 351 U.S. at 177-80. The Supreme Court then analyzed two distinct issues under the Tort Claims Act. First it determined whether the federal agents were acting within the scope of their employment, a requirement under the Act. The Court reasoned:

The fact that the agents did not have actual authority for the procedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment.

351 U.S. at 180-81. The Court resolved the second issue, which was whether the exceptions of §2680(a) applied, in a few sentences. The Court found that the first part of §2680(a) did not apply since the federal agents were not exercising due care. As to the second part, the discretionary function exception, the Court stated only:

Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a "discretionary function" under the Act, see Dalehite v. United States, *supra*. These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

351 U.S. at 181. It should be emphasized that the Court did not say that "these acts were wrongful trespasses and therefore they do not involve discretion on the part of the agents"; instead it merely concluded that "[t]hese acts were wrongful trespasses not involving discretion on the part of the agents," without stating the basis for the conclusion.

The most likely reason for the conclusion that discretion was not involved is that the actions were taken at a low level in contravention of regulations promulgated by the agency to govern the very activity for which damages were sought. Pursuant to statutory authority, the Secretary of the Interior promulgated regulations which required that in the case of unlawfully grazing livestock, written notice together with an order to remove the livestock must be served on the alleged violator. 351 U.S. at 177-78. Thus at the policy-making level it was determined that "[o]nly 'if the alleged violator fails to comply with the notice' may the range manager proceed under local impoundment law and procedure." 351 U.S. at 178. At the operational level the range manager proceeded in the absence of the express preconditions required by the agency. Id. This situation stands in sharp contrast to that of the instant case, where the decision was made at a policy-making level to open mail between the United States and the Soviet Union, and the actions of the local CIA employees were taken as a direct consequence of that policy decision.

As the Supreme Court stated in Dalehite,

acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of §2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

346 U.S. at 36.

The discretionary function exception did not apply in the fact situation of Myers & Myers, Inc. v. United States Postal Service, 527 F. 2d 1252 (C.A. 2, 1975), for the same reason as in Hatahley. In Myers a former "star route" carrier for the U. S. Postal Service brought suit for alleged negligence by the Postal Service in connection with its refusal to renew six star route contracts. The basis of the plaintiff's claim was that the failure to renew resulted solely because of the Service's wrongful and negligent interpretation of information received by the Service concerning the plaintiffs' truck rental arrangements. 527 F. 2d at 1252. This Court held that determining whether or not to renew a star route contract involved a number of policy factors and accordingly involved the exercise of a discretionary function. 527 F. 2d at 1256-57. This Court also rejected plaintiffs' claim based on "negligent investigation" of the facts surrounding the contract renewal decision, on the ground that the claim was really one of abuse of discretion in the contract renewal decision, and was therefore precluded by the discretionary function exception.^{9/} 527 F. 2d at 1257. This Court, however, then made the following analysis: (1) the Postal Service, anticipating constitutional requirements, provides by regulation for notice and a hearing in the circumstances of the plaintiffs' case, and none was given (527 F. 2d at 1257-60), (2) state law might provide a cause of action for refusal to grant such a hearing (527 F. 2d at 1260-61), and (3) if so, §2680(a) would not preclude Tort Claims Act jurisdiction (527 F. 2d at 1261-62).

^{9/} Similarly in the instant case, no matter what plaintiffs choose to call their claims, they are in essence challenges to the legality of a government program authorized at policy-making levels.

As in Hatahley, the determination made at the policy-making level, embodied in the Postal Regulation -- that notice and hearing must be provided in order to bar someone from consideration for star route contract awards -- was simply not carried out by those persons acting at the operational level who so barred the plaintiff.^{10/} Again, as in Hatahley, this situation stands in sharp contrast to that of the instant case, where a decision was made at a policy-making level to open mail between the United States and the Soviet Union, and the actions of the local CIA employees were taken as a direct consequence of that policy decision.

The statement in Myers that it is "a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority" must be read in the context of the Myers set of facts, where operational acts were taken in contravention of policy as embodied in regulations. The cases cited in Myers as authority for the statement (Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); Century Arms, Inc. v. Kennedy, 323 F. Supp. 1002, 1005 (D. Vt.), affd. 449 F. 2d 1306 (C.A. 2, 1971), cert. denied, 405 U.S. 1065 (1972)) all involved the

^{10/} In fact, on a prior administrative bid protest, the Postal Service General Counsel had decided that postal regulations required an opportunity for a hearing. 527 F. 2d at 1254-55.

issue of whether declaratory, injunctive, or mandamus relief could be obtained against a federal officer. Considerations supporting mandamus relief against federal officials acting illegally or unconstitutionally do not support Tort Claims Act relief for such acts. While Congress may well have intended that challenges to illegal or unconstitutional actions on the part of federal officials be undertaken in the traditional context of suits for declaratory or injunctive relief, it did not intend that the constitutionality or legality of government actions should be tested under the Tort Claims Act.^{11/}

This Court's statement in Myers should therefore not be interpreted so broadly as to mean that whenever a person in a policy-making position makes a decision in the exercise of his discretion that turns out to be unconstitutional, the discretionary function exception is unavailable. Such a broad

^{11/} Thus the legislative history states:

The bill is not intended to authorize a suit for damages to test the validity or to provide a remedy on account of such discretionary acts. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.

H.Rep. No. 1287, 79th Cong., 1st Sess., 5-6. See n. 6 , supra.

principle would funnel all kinds of constitutional challenges through the Tort Claims Act, where Congress clearly did not intend them to be. For instance, whenever a deciding official in a regulatory or other agency declines to grant a hearing before making the decision, the issue of whether a hearing is required by due process could be raised under the Tort Claims Act instead of under the Administrative Procedure Act or in a suit for declaratory and injunctive relief. Decisions such as whether to permit a bank to establish a branch, if challenged as contrary to statute, could be challenged under the Tort Claims Act. The discretionary function exception, on the contrary, is the means by which Congress precluded such possibilities.

Thus the Seventh Circuit has applied the discretionary function exception in a case involving action which the Seventh Circuit itself had previously held to be unconstitutional. Kiiskila v. United States, 466 F. 2d 626 (C.A. 7, 1972). The case involved an order by an Army post commander excluding the plaintiff from the post. The plaintiff was a civilian employee of a credit union on the post who lost her job as a result. The Court of Appeals held that the plaintiff's

exclusion from Fort Sheridan was based upon Colonel Nichols' exercise of discretion, albeit constitutionally repugnant, and therefore excepted her claim from the reach of the Federal Tort Claims Act under 28 U.S.C. §2680(a).

466 F. 2d at 627-28. The court discussed the elements of judgment which went into the decision to exclude the plaintiff, and reasoned:

once the Colonel decided to enforce the prohibition [against demonstrations on the post], he had discretion in selecting how to accomplish the enforcement. Of course, this is not to say the Colonel could not, through negligence or wrongful exercise, have abused his discretion by enforcing the regulation against activity "too far removed in terms of both distance and time" (433 F. 2d at 751) to pass constitutional muster; we have already determined the constitutional infirmity of the Colonel's exclusion. 433 F. 2d 745. But 28 U.S.C. §2680(a) precludes action for abuse of discretionary authority whether through negligence or wrongfulness. *Dalehite v. United States*, 346 U.S. 15, 33-34, 73 S.Ct. 956, 97 L. Ed. 1427.

466 F. 2d at 628 (emphasis added). Similarly in the instant case a finding of unconstitutional action would not take an otherwise discretionary decision to implement a program out of the discretionary function exception. It follows that the discretionary function exception precludes liability under the Federal Tort Claims Act in this case.

II. THE POSTAL MATTER EXCEPTION TO THE TORT CLAIMS ACT APPLIES IN THIS CASE.

This Court's decision in Marine Ins. Co. v. United States, 378 F. 2d 812 (C.A. 2, 1967), cert. denied 389 U.S. 953, requires the conclusion that the postal matter exception to the Tort Claims Act also precludes liability in this case. 28 U.S.C. §2680(b) provides that the Tort Claims Act will not apply to:

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

In Marine Ins., a package of emeralds was mailed from Switzerland to the United States. In an attempt to trap a thief, customs officers removed the package briefly from its normal progression and treated it with a fluorescent powder, and then placed it in a registered mail bag to return to normal processing. 378 F. 2d at 813. The emeralds were lost and the private insurer of the sender sued the United States under the Tort Claims Act. Before reaching the issue of whether the plaintiff had stated a claim or whether there was a cause of action, this Court held that the postal matter exception precluded Tort Claims Act liability. This Court held that the package did not temporarily lose its character as postal matter because it was not being handled by postal personnel or because it was used for non-postal purposes. 378 F. 2d at 814. Thus the fact that the mail in this case was opened by CIA personnel for CIA purposes does not take this case out of the postal matter exception.

The claims in this case clearly arise out of the "miscarriage" of letters. "Miscarry" in connection with letters means not only "to fail to reach the intended destination," but also to "go to the wrong destination." Webster's Third New International Dictionary at 1442 (1966). The Oxford English Dictionary defines "miscarry": "Of a letter, etc.: To fail to

reach its proper destination; to get into wrong hands." Vol. M at 498 (1933); Compact Edition at 1809 (1971); (emphasis added). Thus Shakespeare used the term as follows: "The Cardinal's Letters to the Pope miscarried, And came to th' eye o' th' King." Henry VIII, Act III, Scene ii. If the plaintiffs' letters in this case had been simply turned over to the CIA without further delivery, the postal matter exception would clearly apply since the contents of the letters would have come to the eye of persons to whom they were not addressed. It would make no sense not to apply the postal matter exception merely because the letters were ultimately delivered at the proper destination.

The district court read the postal matter exception as limited to cases where registration or insurance could have protected the correspondents from the risk. 436 F. Supp. at 974. There is of course no indication of such a limitation in the words of the exception. The legislative history does indicate, as the district court pointed out, that the availability of registration and insurance was one reason for enacting the exception. But that fact cannot be used to limit the actual words of the statute, particularly since to do so would permit Tort Claims Act suits in situations clearly excluded by the exception, such as when mail is delayed. Neither registration nor postal insurance protects against delay in the mails. Postal Service Manual 162.11 (see 39 C.F.R. Part 111). Postal Service

Publication 42, International Mail 431 (see 39 C.F.R. Part 10). Yet the very legislative history relied upon by the district court refers to delay as an instance where the postal matter exception would apply. Similarly, only the sender may obtain insurance, id., so that incoming international mail could not be insured by the U.S. Postal Service. Yet the postal matter exception hardly permits a reading that loss or miscarriage of incoming international mail may result in liability under the Tort Claims Act. There are numerous other limitations on the ability of registration or insurance to protect against risks. At one time APO mail could be neither registered nor insured. Twentier v. United States, 109 F. Supp. 406, 409 (Ct. Cl. 1953). International insurance service is available only for parcel post packages and only when mailed to certain countries. Postal Service Publication 42, International Mail 431.1. The indemnity limit for international registered letters is \$15.76, except Canada. Id. at 441.1. To permit such limitations to do away with the applicability of the postal matter exception would not be to interpret that provision, but rather to rewrite it. The language simply does not permit such an interpretation.

Therefore since the claims in this case arise out of the miscarriage of letters, the instant suit may not be brought under the Federal Tort Claims Act. Congress has expressly refused to waive sovereign immunity for such claims.

III. THERE IS NO CAUSE OF ACTION
UNDER NEW YORK STATE LAW FOR
WHICH THE DISTRICT COURT COULD
AWARD DAMAGES IN THIS CASE.

Even if, contrary to our previous argument, the exceptions to the Federal Tort Claims Act do not apply in this case, plaintiffs must set forth a cause of action under state law in order to recover. 28 U.S.C. §1346(b). The district court erred in finding a cause of action under New York state law for which damages are recoverable in this case.

A. The district court relied first on a common law invasion of privacy theory. 436 F. Supp. at 976-78; App. In doing so the court overruled a decision of the New York Court of Appeals which has stood 75 years without being overruled either by that Court or this Court. Roberson v. Rochester Folding-Box Company, 171 N.Y. 538, 64 N.E. 442 (1902). In that case, involving the appropriation for commercial purposes of the plaintiff's likeness, the Court rejected "the so-called 'right of privacy'". 171 N.Y. at 556. The New York legislature subsequently provided a cause of action by statute for use of a name, portrait, or picture for commercial purposes without consent. See Prosser, Torts §117 at 803 (4th ed., 1971). Since that time the New York courts have consistently held that no actionable remedy exists at common law for invasion of privacy, and that an action for invasion of privacy is exclusively statutory.

Gautier v. Pro-Football, Inc., 304 N.Y. 354, 358, 107 N.E. 2d 485, 487 (1952) and cases cited therein; Rome Sentinel Co. v. Boustedt, 43 Misc.2d 598, 252 N.Y.S. 2d 10, 12 (Sup. Ct. 1964); Assn. for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee, 37 Misc. 2d 599, 236 N.Y.S. 2d 216, 218 (Sup. Ct. 1962). Even though recognized to be contrary to the law of many other states, the rule has been adhered to. Blair v. Union Free School Dist. No. 6, 67 Misc. 2d 248, 324 N.Y.S.2d 222, 223 (Dist. Ct. 1971). The fact that in some cases New York courts have applied the law of other jurisdictions under conflict of law rules in no way conflicts with the consistently applied rule. See Nader v. General Motors Corp., 25 N.Y.2d 560, 570 n. 3 (1970).

In Nader the New York Court of Appeals held that District of Columbia law provided a cause of action for intrusion. The common law right to privacy is generally considered to be four separate torts, and, as the district court here held, the only one possibly applicable here is the tort of intrusion. 436 F. Supp. at 976-77; see Prosser, Torts, §117 at 804-14 (4th ed. 1971). In finding, on the basis of D.C. cases, that the tort of invasion of privacy had been extended to instances of intrusion, the New York Court of Appeals in Nader stated that District of Columbia

courts have not only recognized a common-law action for invasion of privacy but have broadened that tort beyond its traditional limits.

25 N.Y.2d at 565. Thus the district court in the instant case has not only held that there is a common-law cause of action for invasion of privacy, but has expanded it beyond what the New York Court of Appeals considers "its traditional limits." This conclusion was reached with no consideration of the policy underlying 75 years of New York law -- leaving the creation of tort actions for invasion of privacy to the legislature.

In reaching its conclusion, the district court relied on this Court's dictum in Galella v. Onassis, 487 F. 2d 986, 995 n. 12 (C.A. 2, 1973). In that case, involving the harassment by a photographer of President Kennedy's widow, this Court indicated that the New York Court of Appeals "may well modify or distinguish" Roberson. The New York cases cited, however, all involved circumstances (such as were present in Galella) clearly falling within the bounds of intentional infliction of mental distress. E.g., Long v. Beneficial Finance Co. of N.Y., 39 A.D.2d 11, 330 N.Y.S.2d 664 (1972) (creditor hounding of plaintiff); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (malicious, sarcastic letter taunting plaintiff with unsuccessful attempts to marry defendant). The New York Court of Appeals has stated in Nader, supra, however, that

where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for intentional infliction of emotional distress But the elements of such an action are decidedly different from those governing the tort of invasion of privacy, and . . . we should be wary of any attempt to rely on the tort of invasion of privacy as a means of avoiding the more stringent pleading and proof requirements for an action for infliction of mental distress.

The district court thus erred in finding a New York common law tort for the invasion of privacy. As the federal district court stated in Meeropol v. Nizer, 381 F. Supp. 29, 38 (S.D.N.Y. 1974),

The courts in New York have consistently held that an action for invasion of privacy is exclusively statutory. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902); Hill v. Hayes, 18 A.D.2d 485, 240 N.Y.S. 2d 286 (1st Dept. 1963). Assuming the Galella case recognized a right of privacy beyond the statutory grant, the court limited its decision to an extreme situation involving abusive, physical intrusion, which is not presented here.

B. The district court also relied on the theory of common law copyright under New York law. In New York,

Common law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely -- hence, its other name, the "right of first publication."

Estate of Hemingway v. Random House, 23 N.Y.2d 341, 346, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968). The district court relied on several cases holding that general publication of private letters may be enjoined, or otherwise prevented, on the basis of common law copyright. 436 F. Supp. at 979-81; App. 151-53. It is true that an author's rights under common law copyright do not depend on the literary value of the letter, but the interest protected is nonetheless one of

property rather than privacy. Thus the New York Court of Appeals in Roberson, supra, characterized Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1813) (relied upon by the district court, 436 F. Supp. at 980; App. 152) and several of the cases relied upon in In re Ryan's Estate, 115 Misc. 472, 188 N.Y.S. 387 (Sur. Ct. 1921) (relied upon by the district court, 436 F. Supp. at 981; App. 153) as follows:

In not one of these cases, therefore, was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect.

171 N.Y. at 549-50. It follows that the damages available for infringement of common law copyright must be based on some kind of property value of the letters, rather than the injury to the feelings of the author. An infringer of common law copyright therefore "is usually compelled to disgorge the profits directly traceable to the improper use of the rights which belonged to the copyright owner." 36 N.Y. Jur., Literary Property and Copyright §56 at 208. In the instant case plaintiffs did not demonstrate, and the court did not make findings with regard to, any property value of the three letters, either accruing to the

CIA or lost by plaintiffs.^{12/} Instead, injury to the plaintiffs' feelings and privacy interests were relied upon. It follows that any award of more than nominal damages in this case could not properly be based on a common law copyright theory, and that such a theory cannot support the district court award of damages in this case.

C. Finally, the district court attempted to create a state tort for constitutional violations. The New York cases relied upon, however, deal with activity which is unconstitutional and otherwise a recognized tort, such as battery or trespass. People v. Defore, 242 N.Y. 13, 19, 150 N.E. 585 (1926) (trespass); Fraday v. State, 19 A.D.2d 783, 242 N.Y.S.2d 95

^{12/} Nor is it likely that such a property value could be shown. There is no indication that the CIA can or will benefit financially from the letters. In In the Matter of Ryan, supra, relied upon by the district court, the court held that certain letters written by a legatee to the deceased should not be turned over to the administrator, as they were not estate assets. The court reasoned:

A sale would be an encouragement to persons not interested in the good name of deceased, or his relations, to purchase correspondence for purposes of publication. The alternative is equally disgraceful, for the family might be compelled to bid large sums to retain possession against persons seeking to purchase them.

115 Misc. at 474. In the instant case there is no possibility of sale or of forcing the plaintiffs to pay money to avoid general publication of the content of the letters.

(3d Dept. 1963) (assault); Herman v. State, 78 Misc. 2d 1025, 1031, 357 N.Y.S.2d 811 (Ct.Cl. 1974) (negligence); Casler v. State, 33 A.D.2d 305, 309, 307 N.Y.S.2d 695 (4th Dept. 1970) (false arrest and false imprisonment); Baisch v. State, 76 Misc. 2d 1006, 1010, 351 N.Y.S.2d 617 (Ct. Cl. 1974) (false arrest and false imprisonment).^{13/} Thus in People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976), a criminal case relied upon by the district court, the New York Court of Appeals stated in dictum that a victim of an unconstitutional search may invoke "appropriate forms of civil redress," 40 N.Y.2d at 217, 386 N.Y.S.2d at 381 (emphasis added). The district court is therefore completely unsupported in its conclusion that a violation of the U.S. Constitution per se creates a cause of action in New York.^{14/} Such a violation

^{13/} The district court also cited the New York supreme court decision in Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), finding a cause of action for violation of a constitutional right of privacy regardless of which state's law is applicable. The judgment was affirmed on the basis of District of Columbia law alone, however. 31 A.D.2d 392, 298 N.Y.S.2d 137 (1969), affd. 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970). Indeed, the Appellate Division, in affirming, stated

Judged by District law, untrammelled by
the New York Civil Rights statute,
which would preclude the action, we
must accept the second cause of action.

31 A.D.2d at 395 (emphasis added).

^{14/} Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), created a federal cause of action against individual federal agents for Fourth Amendment violations, but in no way indicated that there would be a cause of action under state law for such violations.

in the instant case could only be brought on an invasion of privacy basis. As we have demonstrated, New York does not recognize such a cause of action in the circumstances of this case.

IV. THE DISTRICT COURT AWARDED EXCESSIVE DAMAGES IN THIS CASE.

Even if the district court was correct in holding that none of the exceptions to the Federal Tort Claims Act applies and that plaintiffs had a cause of action under New York state law, the district court erred in awarding \$1,000 in damages to each of the three plaintiffs, on the record in this case. The district court correctly found that the plaintiffs

experienced no financial losses. Their jobs, their reputations and prestige in their communities did not suffer. They were not subjected to intrusive or humiliating investigations by the government. Their homes were not broken into. They were not assaulted or detained. They lost no time from work and incurred no medical expenses. Plaintiff MacMillen did testify that she broke out in hives and suffered some respiratory difficulties shortly after she learned of the CIA action, but even she did not claim damages for physical injury or medical bills.

436 F. Supp. 987; App. 159. The court nevertheless held that substantial damages were proper in part because the plaintiffs suffered "actual pain, outrage and shock when they learned that government agents had interfered with their privacy by opening and reading their mail." Id. The evidence demonstrates, however, that plaintiffs for the most part were merely very

indignant at the fact that the U.S. Government would engage in such activity. There is little in the record that the plaintiffs, particularly plaintiffs Birnbaum and Avery, were actually affected more than an ordinary citizen reading about CIA mail openings in the newspaper.

Each of the individual plaintiffs was informed of the mail intercept activity as a result of an inquiry filed with the CIA under the provisions of the Freedom of Information Act. Tr. 9-10, 35-36, 58. No evidence was introduced indicating that any of the plaintiffs had any difficulty in determining whether his or her mail had been opened or that access to such information was not routinely provided by the CIA upon request. It is significant to note in this regard that disclosure of each mail opening activity was made privately so that none of the plaintiffs experienced any embarrassment as a result of a public disclosure.

Plaintiff Birnbaum testified that upon learning that his mail had been opened he experienced a sense of shock and outrage. Nevertheless, he was not deterred from mailing any letters to anyone, including letters to colleagues in the Soviet Union. Tr. 28-29; App. 54-55. Plaintiff Avery, according to his testimony, reacted to the disclosure that his mail had been opened in a manner similar to plaintiff Birnbaum. He was disappointed, shocked, outraged, and apprehensive that his mail might be opened again. Tr. 38, 39; App. 64, 65. Like Birnbaum, however, he made no attempt to determine whether

any other items of mail had, in fact, been opened. Tr. 21, 43-44; App. 47, 69-70. Plaintiff MacMillen, like the other plaintiffs, testified that she experienced outrage, embarrassment, and disillusionment with her government. Tr. 62, 64; App. 88, 91. She feared that other letters she might write to her friend in the Soviet Union might be opened, despite seeing headlines in the papers that the mail intercept program had been terminated. Tr. 65, 75; App. 92, 102. Nevertheless, although she was obviously familiar with the Freedom of Information Act, she made no attempt to determine whether the program had, in fact, been terminated or whether any other items of her mail had been opened between 1973 and the present. Tr. 70-71; App. 97-98. Although Ms. MacMillen claimed a good deal of embarrassment as a result of her mail being opened, given the choice between not writing to her friend in the U.S.S.R. and being embarrassed as a result of mail openings by Soviet authorities, she would choose to continue corresponding with her friend. Tr. 78-79; App. 105-106. She had written her friend two more times, after learning that her letter had been opened. Tr. 72; App. 99 .

While we do not suggest that emotional distress and outrage experienced when a person learns that his mail has been opened can never result in actual injuries, the compensation to be afforded for these injuries must be reasonable in light of the loss actually sustained by the plaintiffs. In the context of the facts established at trial, the award of \$1,000

to each plaintiff was clearly disproportionate to any loss the plaintiffs may have experienced.

The intangible injuries sustained by each plaintiff stem from the opening, copying, and reading of one piece of mail. The CIA mail opening program was not directed at any of the individual plaintiffs, nor were any of the plaintiffs on a CIA "watch list." Tr. 105; App. 118. Copies of the plaintiffs' mail were not disseminated to organizations or agencies other than the CIA and, in the case of plaintiff Avery, the FBI. Tr. 99-103; App. 112-16. Dissemination of the information contained in the letters within these agencies was strictly circumscribed (Tr. 100-123; App. 113-36) and led to no investigations or harassment of any kind. Tr. 22-24, 38, 70; App. 48-50, 64, 97.

Moreover, no dispute exists with respect to the fact that, as a result of Executive Order 11905, no authority exists for similar mail opening activities in the future. In fact, the Attorney General has concluded that, if similar mail opening activities were undertaken today, they would be clearly illegal, and those responsible for the program would face criminal prosecution. Clear assurances have thus been provided to the plaintiffs that they need not fear a repetition of the conduct they challenge in this case.

Since the award of \$1,000 in damages cannot realistically be supported by the actual damages suffered by the plaintiffs, ^{15/}

^{15/} Compare United States ex rel. Larkins v. Oswald, 510 F.2d 583, 590 (C.A. 2, 1975) (\$1,000 awarded to prisoner who was unconstitutionally put in solitary confinement for 12 days, five of which were spent without knowing when the solitary confinement was going to end.)

the district court sought to support such awards on other bases: the inherent value of the constitutional right involved, the need to deter future misconduct, and the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520. 436 F. Supp. at 987-89; App. 159-61. We now demonstrate that the use of these rationales is unsupportable in a Federal Tort Claims Act suit.

The district court asserted that plaintiffs "are entitled to recover for the invasion of their rights, without respect to the consequences" (436 F. Supp. at 987; App. 159), relying on the Restatement (Second) of Torts: "one who suffers an intrusion upon his solitude or seclusion . . . may recover damages for the deprivation of his seclusion." 436 F. Supp. at 987-88; App. 159-60. This statement however only supports the possibility of damages for actual, if intangible, injury. Where a right is invaded, but there are no adverse consequences, only nominal damages may be awarded. This is the hornbook law of damages..

The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot, except in the cases in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong. In other words, one injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury, but no more. His recovery is, in the absence

of circumstances giving rise to an allowance of punitive damages, limited to a fair compensation and indemnity for the injury which he suffered. The law will not put him in a better position than he would be had the wrong not been done or the contract not been broken.

22 Am. Jur. 2d, Damages §13.

The district court however cited Piphus v. Carey, 545 F.2d 30, 31-32 (C.A. 7, 1976), for the proposition that more than nominal damages may be awarded where no actual damages have been shown, in the case of constitutional torts. 436 F. Supp. at 988; App. 160 . Piphus involved high school students who were suspended in violation of their due process rights, but who failed to prove actual damages in a suit brought under 42 U.S.C. §1983. The Seventh Circuit held that

damages for the injury which is "inherent in the nature of the wrong" are recoverable for a violation of the right to procedural due process, as they are for the deprivation of voting rights or other constitutional rights.

545 F.2d at 31. The holding is contrary to the law of this and other circuits, and the Supreme Court has accordingly granted certiorari to review the Piphus decision. 45 U.S.L.W. 3960 (April 18, 1977). In Fort v. White, 530 F.2d 1113 (C.A. 2, 1976), this Court discussed the propriety of awarding compensatory damages in the absence of a showing of actual damages in a case involving race discrimination in housing under Title

VIII of the Civil Rights Act of 1968 (42 U.S.C. §3601 et seq.) and the Civil Rights Act of 1871 (42 U.S.C. §1982). This Court held that proof of actual damages was required, and concluded:

Here there was not only no proof of humiliation but the complaint, while seeking actual damages, makes no mention of humiliation or embarrassment. In view of the plaintiffs' waiver and the absence of any evidentiary basis which would allow the trier of fact to estimate or assess such damages, we find no error in the denial of compensatory damages.

530 F.2d at 1116. See also Stolberg v. Members of Bd. of Trustees, 474 F.2d 485, 488-89 (C.A. 2, 1973) (First Amendment violation); United States ex rel. Tyrrell v. Speaker, 535 F.2d 823, 829-30 (C.A. 3, 1976) (denial of due process); Magnett v. Pelletier, 488 F.2d 33 (C.A. 1, 1973) (warrantless search); Smith v. Losee, 485 F.2d 334 (C.A. 10, 1973) (en banc), cert. denied 417 U.S. 908 (1974) (First Amendment violation). ^{16/} More recently, the Court of Appeals for the District of Columbia Circuit reversed an award of \$7,500 for violation of the First Amendment in a case involving arrest of persons attempting to demonstrate on the Capitol grounds. The D.C. Circuit stated:

^{16/} But see Unified School District No. 480 v. Epperson, 551 F.2d 254, 261 (C.A. 10, 1977), petition for certiorari pending.

That loss of an opportunity to demonstrate constitutes loss of First Amendment rights "in their most pristine and classic form" does not mean, however, that monetary recompense should be extravagant. The award must be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights. Comparing these principles with the instructions actually given the jury, we find error because those instructions did not require the jury to focus on the loss actually sustained by the plaintiffs.

Dellums v. Powell, 566 F.2d 167, 195-96 (C.A.D.C., 1977)

(emphasis added), petition for certiorari pending,

S. Ct. No. 77-955. In assigning a monetary value

to an abstract right, a trier-of-fact runs the risk of being arbitrary. And unless awards are restricted to actual damages, a plaintiff could recover substantial sums for the loss of a right even though he valued it not at all and was not the least bit distressed at losing it. The district court therefore erred to the extent that it relied on the inherent value of constitutional rights.

The district court also clearly relied upon the deterrent effect of substantial awards for the invasion of plaintiffs' privacy. One indication of this is the equality of the awards to the three plaintiffs (despite differences in the degree to which the three letters were personal). While purporting not to award punitive damages (436 F. Supp. at 986; App. 158), the court nonetheless stated in its conclusion that "knowledge

by government officials that individuals have effective legal remedies to enforce their rights may deter future illegality." 436 F. Supp. at 989-90; App. 161-62. Of course to the extent that damages are awarded to deter future misconduct rather than to compensate, they are punitive rather than compensatory. See Prosser, Torts §2 at 9 (4th ed. 1971). ^{17/} Under the Federal Tort Claims Act, the United States is not liable "for punitive damages." 28 U.S.C. §2674. The fact that a judgment includes compensatory damages does not prevent setting aside so much of the judgment as was based on punitive theories of recovery. Cf. Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 132 (1956). This Court has been careful to insure that only compensatory damages are awarded under the Federal Tort Claims Act. O'Connor v. United States, 269 F.2d 578, 585 (C.A. 2, 1959). Given the nature of the injuries found to have been suffered by the plaintiffs in this case, an award of \$1,000 to each plaintiff was clearly punitive in nature and should be reversed.

^{17/} The punitive nature of the court's award is also indicated by the tie-in between the damage award and the transmittal of an apology letter. We submit that the apology letter requirement was improper in any event. See Frankel v. Heym, 466 F.2d 1226, 1228-29 (C.A. 3, 1972) (A judgment in a Federal Tort Claims suit may not be awarded in the form of a trust since only a lump sum money judgment is permitted under the Act and "[i]f novel types of awards are to be permitted against the government, Congress should affirmatively authorize them.")

Finally, the district court relied upon the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which created a civil cause of action for individuals whose telephone or oral conversations were intercepted without legal sanction by wiretaps or eavesdropping. 436 F. Supp. at 989; App. 161 . The statute provides for

actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

in addition to punitive damages in the case of malice, and attorney's fees. 18 U.S.C. §2520. The statutory minimum amount of damages, however, overrules the common law rule only to the extent that the statute is applicable, which it clearly is not the present case. The common law rule therefore remains to be applied in this case, and any award beyond actual damages must be reversed. In fact, the very setting of a statutory minimum implies a belief that without it, actual damages would frequently be much less. Moreover, in setting the minimum Congress may have intended in part to deter violations; such a purpose cannot support an award of damages under the Federal Tort Claims Act, as we have shown.

The various arguments used by the district court therefore do not support an award of damages beyond those actually incurred by the plaintiffs. Because actual damages could not reasonably amount to \$1,000 for each plaintiff, the district court's award of damages was excessive.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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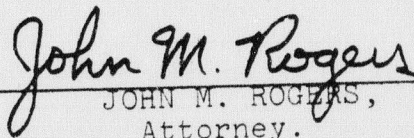
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Dear Mr. Fusaro:

Enclosed for filing are

10 copies of our ^{printed} brief*
10 copies of our appendix

in the above-captioned matter.

Yours very truly,

Morton Hollander

MORTON HOLLANDER
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